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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ENRIQUE ALEJANDRO BARRERA
COLATO,

Defendant and Appellant.

B271690

(Los Angeles County
Super. Ct. Nos. MA066490,
MA067907)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles A. Chung, Judge. Affirmed.

Carlo Andreani, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Shawn McGahey Webb and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Enrique Alejandro Barrera Colato (defendant) appeals from the judgment entered after he pled no contest to possession of marijuana for sale. Defendant makes several contentions relating to his right to counsel and his right to the effective assistance of counsel. He contends: that the trial court failed to conduct an inquiry required under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*); that the trial court improperly heard defendant's pro. per. motion to withdraw his plea while he was represented by counsel; that defense counsel had a conflict of interest; and that defense counsel rendered ineffective assistance by failing to move to withdraw his no contest plea. We find no merit to any of defendant's contentions, and thus affirm the judgment.

BACKGROUND

In July 2015, defendant was charged in Los Angeles County Superior Court case No. MA066490, with mayhem, in violation of Penal Code section 203,¹ and two counts of felony battery, one with the sentence enhancement allegation that defendant inflicted great bodily injury upon his victim. Defendant entered into a plea agreement in which he pled no contest to mayhem, and the two remaining counts were dismissed. On August 8, 2015, the trial court sentenced defendant according to the terms of the agreement to eight years in prison, suspended, and placed defendant on formal probation for five years, including the condition that he serve 180 days in county jail. On December 21, 2015, the trial court revoked defendant's probation and issued a bench warrant for his arrest.

In February 2016, a felony complaint was filed in case No. MA067907, charging defendant with possession of marijuana for

¹ All further statutory references are to the Penal Code, unless otherwise indicated.

sale in violation of Health and Safety Code section 11359, and with sale, offering to sell, or the transportation of marijuana in violation of Health and Safety Code section 11360, subdivision (a). It was further alleged that defendant had suffered a prior serious or violent felony conviction within the meaning of the “Three Strikes” law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)).

On February 26, 2016, defendant entered into a plea agreement under the following terms, as stated by the prosecutor: “For a plea to count 1, the defendant will be sentenced to midterm two years, concurrent with his E.S.S. of eight years’ state prison in case number MA066490, and we will be striking the strike on this case.” Defendant signed the Judicial Council explanation form and waiver of rights, and initialed each advisement and waiver, including his right to present a defense. Defendant acknowledged his signature and initials in court, and stated to the court that the prosecutor’s explanation was his understanding of the agreement. Defendant also told the court that his attorney had gone over the form with him and had explained his constitutional rights, as well as the consequences of the plea, and that he had no questions regarding his rights or the consequences of his plea. The court then orally explained defendant’s trial rights, including the right to present a defense, and asked whether defendant understood them, gave them up, and was entering his plea freely and voluntarily. Defendant replied in the affirmative, and entered his no contest plea. The trial court scheduled sentencing for the following month.

At the outset of the sentencing hearing of March 15, 2016, apparently after an off-the-record discussion with counsel, the trial court stated: “We are on the record in the Barrera Colato matters, MA66490 and 67907. [Defendant] wants to run a *Marsden* motion and possibly withdraw his plea.” The court

asked the prosecutor to step out, and then asked defendant what he wanted. Defendant replied, “Your honor, I don’t understand about my case.” He explained: “What I was signing. I did not know I was signing for my joint suspension. . . . I didn’t understand I was going to sign for my joint suspension also for the two years. Also I feel like my Fifth Amendment was violated during my detainment. They questioned me before reading me my *Miranda* rights and I just wanted to say that.” The court brought back the prosecutor and stated: “After hearing what [defendant] had to say I don’t think it was fall -- although I could see why you had that concern, [defense counsel], but I don’t think it falls into quite the *Marsden* situation. [Defendant] would like to withdraw his plea because he feels that he was perhaps misinformed or misled by his attorney regarding the disposition.”

The court then summarized the oral record of February 26, as well as the plea waiver form which defendant had signed and initialed. The court noted that defendant had told the court at the time of his plea that he understood his rights, had been advised of the consequences, that he waived his rights, and that he entered his plea freely and voluntarily. The trial court found that defendant did not truly misunderstand his rights and consequences, but rather his present claim was “more a situation of buyer’s remorse.” The court explained to defendant that by expressly waiving his right to present a defense, he gave up any defense based upon the Fifth Amendment and the applicability of *Miranda*. The court concluded, “For all that I’m not going to allow you to withdraw your plea,” and asked, “Waive arraignment for judgment, time for sentencing?” Defense counsel replied, “Yes. No legal cause.” The court terminated defendant’s probation, ordered execution of the eight-year term that had been previously imposed and suspended in case No. MA066490, and sentenced defendant to a concurrent term of two years in case No.

MA067907. Defendant filed a timely notice of appeal from the judgment and obtained a certificate of probable cause.

DISCUSSION

I. *Marsden* inquiry

Defendant contends that the trial court erred in failing to conduct a sufficient *Marsden* inquiry. In particular, he contends that the court was required allow defendant to state his reasons for requesting a change of attorneys and to articulate the causes of his dissatisfaction with counsel, and if any of them suggested ineffective assistance counsel, to conduct an inquiry of defense counsel.

“When a defendant seeks new counsel on the basis that his appointed counsel is providing inadequate representation -- i.e., makes what is commonly called a *Marsden* motion ([*Marsden*, *supra*,] 2 Cal.3d 118) -- the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of inadequate performance.” (*People v. Smith* (2003) 30 Cal.4th 581, 604.) No formal motion is necessary to trigger the trial court’s duty to inquire; however, the court is obligated to conduct a full *Marsden* hearing only “when there is ‘at least some clear indication by defendant,’ either personally or through his current counsel, that defendant ‘wants a substitute attorney.’ [Citation.]” (*People v. Sanchez* (2011) 53 Cal.4th 80, 89-90 (*Sanchez*).)

We agree with respondent that defendant’s comments were insufficient to indicate that he was requesting a *Marsden* hearing or requesting new counsel. Defendant did not make such a request nor did he complain about defense counsel’s representation. The trial court found there had been no *Marsden* motion. Defendant argues here that “Defendant *essentially* alleged that his [current] attorney ineffectively failed to present a viable defense to his probation revocation based upon a Fifth

Amendment violation that occurred during his detention.”
(Italics added.) If defendant’s interpretation is in fact what he intended below, that was not communicated to the court in a way that suggested a desire to discharge or substitute counsel.

Further, the court did inquire into defendant’s request. The court asked, “What is it you want?” Defendant replied that he did not understand what he was signing, and said, “Also I feel like my Fifth Amendment was violated during my detainment. They questioned me before reading me my *Miranda* rights and *I just wanted to say that.*” (Italics added.) Thus, defendant just wanted to explain his claimed misunderstanding, and the trial court liberally interpreted his complaint as a wish to withdraw his plea. But as defendant gave no indication of wanting new counsel, the court was not required to conduct a *Marsden* hearing. (See *Sanchez, supra*, 53 Cal.4th at pp. 89-90.) Moreover, a trial court’s failure to conduct a hearing will not justify reversal where a *Marsden* motion would have been baseless, such as where “complaints of counsel’s inadequacy involve tactical disagreements. [Citations.]” (*People v. Dickey* (2005) 35 Cal.4th 884, 921-922.)

Defendant argues that the request to substitute counsel was clearly indicated, as demonstrated by the trial court’s “acknowledgement” that defendant “wants to run a *Marsden* motion,” as well as the court’s later statements that defense counsel had “that concern,” and that defendant “would like to withdraw his plea because he feels that he was perhaps misinformed or misled by his attorney regarding the disposition.” We are not persuaded by defendant’s selected paraphrases.

The trial court’s initial statement cannot be stretched into an acknowledgement that a *Marsden* motion had been or would be made. The court was clearly referring to an unreported discussion with counsel, and as there is no record of it, we decline

to speculate about what counsel told the court regarding defendant wanting new counsel. “Matters not presented by the record cannot be considered on the suggestion of counsel in the briefs.’ [Citations.]” (*People v. Merriam* (1967) 66 Cal.2d 390, 396-397, disapproved on another point in *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 882.)

The court’s second statement, that it could see why defense counsel had “that concern,” was again apparently a reference to the unreported exchange in which defendant may or may not have said anything to counsel about wanting a new attorney. Defense counsel’s “concern” that there might be a *Marsden* issue is far from a “clear indication.”

Finally, we reject defendant’s argument that the trial court acknowledged a request for new counsel when it speculated that defendant wanted to withdraw his plea based on a belief “that he was perhaps misinformed or misled by his attorney regarding the disposition.” The court was not acknowledging a unarticulated request for substitute counsel, but was instead introducing a detailed explanation of the reasons why it did not believe that defendant misunderstood the consequences of his plea. A trial court’s “poor choice of words” does not trigger the obligation to conduct a *Marsden* hearing in the absence of some clear request for new counsel. (*People v. Dickey, supra*, 35 Cal.4th at pp. 920-921.) There was no such request here.

II. Right to counsel

Defendant contends that the trial court improperly heard and denied defendant’s pro. per. motion to withdraw his no contest plea, despite his right to have the motion presented by counsel, and that this resulted in a violation of his Sixth Amendment right to the assistance of counsel.

Defendant relies on *People v. Brown* (1986) 179 Cal.App.3d 207 (*Brown*), where it was held that when a defendant requested

appointment of substitute counsel after his attorney refused to represent him in a motion to withdraw his plea, “[i]t was improper to permit defendant to bring his motion in pro. per. while he was still represented by counsel and he had not waived his right to counsel. [Citation.]” (*Id.* at pp. 214-215.) We agree with respondent that *Brown* is distinguishable on its facts. Here, unlike in *Brown*, defendant did not make a motion to withdraw his plea or ask for new counsel to do so, and defense counsel did not refuse to bring a motion. Instead the trial court inferred from defendant’s complaints that he wished to withdraw his plea.

In reply, defendant suggests that the facts are unimportant, as the “central holding” of *Brown* was a defendant’s right to have his attorney present the motion to withdraw his plea. Defendant contends that *Brown* also held that any denial of that right requires automatic reversal. The *Brown* court did not hold that reversal is automatic whenever defense counsel refuses to present a motion to withdraw the defendant’s plea. The appellate court reversed the judgment because the trial court failed to conduct a *Marsden* hearing when the defendant requested substitute counsel. (*Brown, supra*, 179 Cal.App.3d at p. 216.) Further, the court acknowledged that counsel could not be required to make a motion “which, in counsel’s good faith opinion, is frivolous or when to do so would compromise accepted ethical standards. [Citation.]” (*Ibid.*) And there is no language in *Brown* eliminating the requirement of a *request* for substitute counsel, or some other clear indication, a requirement which has persisted long after the publication of *Brown*. (See *Sanchez, supra*, 53 Cal.4th at pp. 89-90.) Further, even upon request, new counsel should not be appointed to bring a motion to withdraw a plea, unless the defendant shows that there were arguable or nonfrivolous grounds for the motion. (See *People v. Smith* (1993) 6 Cal.4th 684, 688-691, 695-696.)

When a defendant asks the court to change his plea, without seeking substitute counsel, it is appropriate for the court to question him regarding the grounds for the motion, and to review the record of the plea and the defendant's understanding of his rights and the consequences of the plea. (See *People v. Mesa* (1985) 174 Cal.App.3d 58, 59-60 [defendant orally moved to withdraw guilty plea on ground he was not guilty].) If the court determines that no legal grounds exist, it does not err in finding that counsel's failure or refusal to file a motion was not improper. (*Id.* at pp. 60-62.) Further, where the record supports the trial court's conclusion that defendant's waivers were valid and his plea was entered freely, voluntarily, and with an understanding of the consequences, defendant has not been prejudiced. (*Id.* at pp. 61-62.)

We distill from these authorities that the court does not err in failing to appoint new counsel to present a motion for change of plea where, as here, the record indicates no good cause for withdrawal of the plea, and defendant did not move to withdraw his guilty or no contest plea or to substitute counsel, but instead merely stated facts from which the trial court inferred a desire to withdraw the plea.

The court's determination that the defendant failed to articulate legal grounds to withdraw his plea, is reviewed for an abuse of discretion. (See *Smith, supra*, 6 Cal.4th at pp. 688-691, 695-696.) On appeal, it is always the appellant's burden to demonstrate an abuse of discretion and a resulting miscarriage of justice. (See *Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) To demonstrate a miscarriage of justice, defendant must show that a different result was reasonably probable absent the alleged error. (See *People v. Watson* (1956) 46 Cal.2d 818, 836; see Cal. Const., art. VI, § 13.) Defendant makes no attempt to do so here, rather he argues that the court's procedure was presumptively

prejudicial because it amounted to a denial of assistance of counsel. We have already concluded to the contrary.

Moreover, we find ample support in the record for the trial court's ruling. A guilty plea may be withdrawn due to mistake, ignorance or other factor overcoming the exercise of free judgment. (*People v. Cruz* (1974) 12 Cal.3d 562, 566.) However, when the defendant claims that he was misadvised or not advised of the consequences of the plea, he "must show ignorance: that he was actually unaware of the possible consequences of his plea." (*People v. Castaneda* (1995) 37 Cal.App.4th 1612, 1619.) Defendant's ignorance must be shown by clear and convincing evidence. (*People v. Cruz, supra*, at p. 566.) Here, the trial court reviewed the transcript of the oral plea proceedings, as well as the plea form, and concluded that defendant had not misunderstood his rights or the consequences of his plea. The record overwhelmingly supports that conclusion. Both the prosecutor and the Judicial Council form set forth the terms of the plea agreement, including the promise of a two-year term on the current offense, which would be concurrent with the eight-year commitment in case No. MA066490. Defendant initialed the paragraphs indicating that he understood his constitutional right to present a defense, that he had discussed his constitutional and statutory rights with his attorney, and that he waived his constitutional rights. In addition, defendant orally represented to the court that his attorney had gone over the form with him and had explained his constitutional rights, as well as the consequences of the plea, and that he understood them.² The

² Defendant argues here that a young person untrained in the law might have been confused by the use of the acronym, ESS. Assuming that defendant did not understand the meaning of the term, there is no evidence that its use caused any confusion.

court nevertheless gave defendant a third explanation of his trial rights, including the right to present a defense, and the court asked whether defendant understood them, gave them up, and was entering his plea freely and voluntarily. Defendant replied in the affirmative, and entered his no contest plea.

Defendant has not met his burden to demonstrate a reasonable probability of a different result had he or his attorney presented a written motion to change his plea. In light of the high standard of proof that defendant would face to show good cause, we conclude beyond a reasonable doubt that there was no such probability.

III. Conflict of interest

Defendant contends that the trial court violated his Sixth Amendment right to be represented by an attorney who had no conflict of interest with her client. He argues that reversal and remand is required with directions to the trial court to appoint conflict-free counsel.

“A criminal defendant is guaranteed the right to the assistance of counsel by the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution. This constitutional right includes the correlative right to representation free from any conflict of interest that undermines counsel’s loyalty to his or her client. [Citations.]” (*People v. Doolin* (2009) 45 Cal.4th 390, 417 (*Doolin*.) Unless defendant objects or the trial court should reasonably know that counsel has a conflict of interest, the court is not obligated to inquire or investigate. (*People v. Ramirez* (2006) 39 Cal.4th 398, 427-428; see *Cuyler v. Sullivan* (1980) 446 U.S. 335, 346-347 [counsel representing multiple defendants].) And the duty to inquire is not triggered by “a vague, unspecified possibility of conflict.” (*Mickens v. Taylor* (2002) 535 U.S. 162, 169; *People v. Cornwell* (2005) 37 Cal.4th 50, 75-76, disapproved on another

ground in *Doolin, supra*, at p. 421, fn. 22.) Even where the trial court “knows or reasonably should know of a particular conflict of interest, the court may decline to pursue the matter if, in its view, the potential for conflict is too slight. [Citation.]” (*People v. Cornwell, supra*, at p. 75.)

On appeal, “claims of Sixth Amendment violation based on conflicts of interest are a category of ineffective assistance of counsel,” and thus subject to review under the principles enunciated in *Strickland v. Washington* (1984) 466 U.S. 668. (*Doolin, supra*, 45 Cal.4th at p. 417; see also *Mickens, supra*, 535 U.S. at p. 166.) Accordingly, defendant is required “to show (1) counsel’s deficient performance, and (2) a reasonable probability that, absent counsel’s deficiencies, the result of the proceeding would have been different.” (*Doolin, supra*, at p. 417; *Mickens, supra*, at p. 166.) “In the context of a conflict of interest claim, deficient performance is demonstrated by a showing that defense counsel labored under an actual conflict of interest ‘that affected counsel’s performance -- as opposed to a mere theoretical division of loyalties.’ [Citations.]” (*Doolin*, at p. 417, quoting *Mickens*, at p. 171, italics omitted.)

It is defendant’s burden to “““show counsel’s performance was “deficient” because his “representation fell below an objective standard of reasonableness . . . under prevailing professional norms.”. . .”” [Citation.]” (*People v. Vines* (2011) 51 Cal.4th 830, 876.) Defendant describes the alleged conflict as follows: “MA067907 counsel operated under an actual conflict of interest because she could not reasonably be expected to argue that she failed to litigate a dispositive Fifth Amendment issue and/or that she and/or [her] prior colleague misadvised and/or failed to advise appellant adequately on the subtle, but very important, distinction between ISS (imposition of sentence suspended) and ESS (execution of sentence suspended).”

The record is devoid of evidence that defendant's claimed Fifth Amendment issue was dispositive, or that defense counsel failed to explain it to defendant. The record is equally lacking evidence that defense counsel failed to advise defendant regarding the definitions of or distinction between "ISS" and "ESS," or even that an understanding of those terms was somehow key to understanding the consequences of the plea. Moreover, as discussed, there was no evidence or claim below that counsel failed to advise defendant of the consequences of his plea, or that defendant was in actual ignorance of the consequences of his plea.

We conclude that defendant has failed to meet his burden to show deficient performance by counsel, as his speculation does not demonstrate deficient performance, a conflict of interest, or even an arguable division of loyalties. Further, as defendant makes no effort to demonstrate a miscarriage of justice, his claim fails. (See *Doolin, supra*, 45 Cal.4th at p. 417; *Mickens, supra*, 535 U.S. at p. 166.)

IV. Failure to move to withdraw plea

Defendant contends that defense counsel rendered ineffective assistance by failing to move to withdraw his no contest plea.

The Sixth Amendment right to assistance of counsel includes the right to the effective assistance of counsel. (*Strickland v. Washington, supra*, 466 U.S. at pp. 686-674; see also Cal. Const., art. I, § 15.) "Generally, a conviction will not be reversed based on a claim of ineffective assistance of counsel unless the defendant establishes *both* of the following: (1) that counsel's representation fell below an objective standard of reasonableness; *and* (2) that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.] If

the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails.” (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.)

“Reviewing courts defer to counsel’s reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a ‘strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.’ [Citation.] Defendant’s burden is difficult to carry on direct appeal, as “[r]eviewing courts will reverse convictions [on direct appeal] on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission.” [Citation.]” (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437.)

We have already determined that the record does not indicate any good cause for withdrawal of defendant’s no contest plea. The trial court reviewed the transcript of the oral plea proceedings, as well as the plea form, and concluded that defendant had not misunderstood his rights or the consequences of his plea. The record overwhelmingly supports that conclusion. A reasonably competent attorney might well determine that under such circumstances, the motion would have no merit. Counsel does not render ineffective assistance by failing to make a meritless motion. (*People v. Price* (1991) 1 Cal.4th 324, 386-387.) And it follows that a meritless motion has no reasonable probability of success.

Defendant suggests that he was “prejudiced by the denial of the opportunity to withdraw his plea based upon his mistaken understanding of his ‘joint suspension’ or a mistaken impression that ESS was ISS, or any other valid legal ground.” We have already determined there was no reasonable probability of a different result had defense counsel presented a motion to change defendant’s plea. We have found overwhelming support for the

trial court's rejection of defendant's claim not to have understood the "joint suspension" consequence of his plea. Further, there is no indication in the record that defendant did not understand the distinction between ISS and ESS, or that defense counsel failed to advise defendant regarding the terms. Defendant also fails to explain how the result would have been different if defense counsel had brought a motion based on defendant's misunderstanding of such terms.

As defendant has failed to demonstrate deficient performance by counsel or the reasonable probability of a different result, we reject his claim of ineffective assistance of counsel.

DISPOSITION

The judgment is affirmed.

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_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.*
GOODMAN

* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.